No. 84-1491

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1985

PHILADELPHIA NEWSPAPERS, INC., *et al.*,
*Appellants*,

v.

MAURICE S. HEPPS, *et al.*,
*Appellees*

On Appeal from the Supreme Court of Pennsylvania

## [redacted] BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE IN SUPPORT OF APPELLANTS

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**On Appeal from the Supreme Court of Pennsylvania**

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## MOTION OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* IN SUPPORT OF APPELLANTS

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The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO"), a federation of 95 national and international labor organizations having a total membership of approximately 13,500,000 working men and women, moves the Court for leave to file the attached brief *amicus curiae* in support of appellants. Appellees have refused to consent to the filing of said brief.

The AFL-CIO and its affiliated unions participate actively in the public dialogue on issues of concern to workers at the local, state and national level. At issue

in this case is whether the First Amendment permits the use of the libel laws to penalize those who speak on matters of public concern unless it is established that such speech is false. The resolution of that issue is of profound concern to all who participate in the debate on public issues and to all who believe that such debate should be uninhibited. Accordingly, the AFL-CIO seeks leave to file the attached brief *amicus curiae* to demonstrate that under the First Amendment, truthful statements on matters of public concern are constitutionally protected even if such statements are injurious to the reputation of another, and that the First Amendment does not allow damages to be awarded against one who speaks on a matter of public concern in the absence of a proper finding that the statement in question is false.

For the foregoing reasons this motion for leave to file the attached brief *amicus curiae* should be granted.

Respectfully submitted,

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## BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE IN SUPPORT OF APPELLANTS

The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO") submits this brief *amicus curiae* contingent upon the granting of the foregoing motion for leave to file said brief. The interest of the *amicus curiae* is stated in that motion.

## SUMMARY OF ARGUMENT

The question presented here is unlike the ones that have been posed to this Court in the cases following *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). Those cases all involved speech which was proven (or at least assumed) to be false and which therefore "carrie[d] no First Amendment credentials," *Herbert v. Lando*, 441

U.S. 153, 171 (1979). The issue in those cases was whether to "extend a measure of *strategic* protection," *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974) (emphasis added), to such speech in order not to chill the dissemination of truthful speech. In this case, in contrast, what is at issue is one aspect of the procedures for determining whether speech on a matter of public concern is true or false. The resolution of that issue does not turn on the prophylactic considerations that have been determinative in past cases, but rather on more elementary principles of First Amendment jurisprudence. Part A, pp. 4-7 *infra*.

The First Amendment embodies our "profound national commitment to the principle that debate on public issue should be uninhibited, robust and wide-open." *New York Times, supra*, 376 U.S. at 270. Given this commitment, the Court has concluded that the interest in truthful expression on matters of public concern outweighs the countervailing interests of those whose reputation may be injured by such expression, regardless of the speaker's motivation in making the truthful publication. Because true statements on public issues are constitutionally protected, their publication may not form the basis for an award of damages. And this in turn requires that, in a defamation action, before a defendant/speaker may be required to pay damages on account of his speech, the plaintiff must prove that the speech is false and therefore unprotected. Any other rule would permit speech to be sanctioned, through civil damages, absent proof that (or where the evidence is in equipoise as to whether) the speech is false and therefore stands outside the protective umbrella of the First Amendment. Part B, pp. 8-11, *infra*.

In the context of the prophylactic rules of culpability formulated in *New York Times* and its progeny the Court has recognized as much. Those cases hold that where nonculpable, false speech is entitled to "strategic protection," the burden of proving culpability rests on the plaintiff. If



a plaintiff is required to prove that a defamatory falsehood does not qualify for "strategic protection," it follows *a fortiori* that the plaintiff must also be required to prove that a defamatory statement is false and therefore does not qualify for the protection to which truthful speech is entitled in its own right. Part C, pp. 11-12 *infra*.

The Pennsylvania Supreme Court's contrary view rests on its conclusion that there is no "legitimate constitutionally protected interest in condoning the media's malicious or negligent discharge" of its informational function. But given the values and purposes of the First Amendment, there is an overriding interest in disseminating truthful information, and it is contrary to the First Amendment to punish the publication of truthful information simply because the media did not act responsibly in deciding to publish the information. Part D, pp. 12-14, *infra*.

This conclusion is confirmed by decisions of the Court involving analogous First Amendment questions. In the obscenity cases, for example, the Court has concluded that "the burden of proving that the [speech] is unprotected expression must rest on the censor." *Freedman v. Maryland*, 380 U.S. 51, 58 (1965). And in *Speiser v. Randall*, 357 U.S. 513 (1958), the Court held that California had violated the First Amendment by requiring taxpayers to prove that they had not engaged in unprotected expression in order to qualify for a tax exemption; the First Amendment, the Court concluded, required the State to assume the burden of persuasion on that issue. The reasoning of those decisions is fully applicable here. Part E, pp. 14-16 *infra*.

## ARGUMENT

### THE FIRST AMENDMENT DOES NOT ALLOW THE AWARD OF DAMAGES IN A DEFAMATION ACTION UNLESS THE PLAINTIFF ESTABLISHES THAT THE DEFAMATORY STATEMENT IS FALSE

The brightness of the constitutional principles stated in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), has been tarnished by twenty years of litigation generated by the tension between our "society's interest in 'uninhibited robust and wide-open' debate on public issues" and the "legitimate state interest" in preserving "the individual's right to the protection of his own good name" from "the harm inflicted . . . by defamatory falsehood," *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340, 341 (1974). The instant case permits us to see again, cleaned of that coating, the unalloyed truth of *New York Times*' most basic teaching: "What a state may not constitutionally bring about by means of criminal statute is likewise beyond the reach of its civil law of libel." 376 U.S. at 277. As we show below, so long as that much is granted—so long as it is recognized that the term "libel" is no talisman that forecloses First Amendment analysis and that "a State cannot foreclose the exercise of constitutional rights by mere labels," *NAACP v. Button*, 371 U.S. 415, 429 (1963)—it is plain that the Pennsylvania rule at issue here cuts deeply into free speech on public issues and is not justified by any countervailing state interest.

**A.** The question presented here is unlike the ones that have been posed to and have divided this Court in the years since *New York Times*.[1] Those disputes all involved speech which was held to be both defamatory and *false*.

[1] As the court below noted, there is language in several of this Court's prior decisions which appears to address the issue posed here and to "state[] the *New York Times* holding as requiring proof of falsity as part of the plaintiff's prima facie case." Pet. App. A-11



In this case what is at issue is precisely whether the speech in question is true or false.

This difference is of central legal significance because, as the Court repeatedly has concluded, "there is no constitutional value in false statements of fact." *Gertz*, *supra*, 418 U.S. at 340. "Neither lies nor false communications serve the ends of the First Amendment," *St. Amant v. Thompson*, 390 U.S. 727, 732 (1968), and thus "[s]preading false information in and of itself carries no First Amendment credentials," *Herbert v. Lando*, 441 U.S. 153, 171 (1979). Rather, "the intended lie [and] the careless error . . . belong to that category of utterances which 'are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them

n.4, *citing Garrison v. Louisiana*, 379 U.S. 64, 74 (1964) ("a public official might be allowed the civil remedy only if he establishes that the utterance was false"); *Rosenblatt v. Baer*, 389 U.S. 75, 84 (1966); *Greenbelt Corp. Pub. Ass'n v. Bresler*, 398 U.S. 6, 8 (1970). Most recently, in *Herbert v. Lando*, 441 U.S. 153, 175-76 (1979), the Court stated:

> Although defamation litigation . . . is an ancient phenomenon, it is true that our cases from *New York Times* to *Gertz* have considerably changed the profile of such cases. In years gone by, plaintiffs made out a prima facie case by proving the damaging publication. Truth and privileges were defenses. . . . The plaintiff's burden is now considerably expanded. *In every or almost every case, the plaintiff must* focus on the editorial process and *prove a false publication* attended by some degree of culpability on the part of the publisher. [Emphasis added]

At the same time, as the court below also noted, there is dictum in other opinions that looks the other way, or at least is unclear. *E.g., Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 490 (1975) ("the *defense of truth* is constitutionally required where the subject of the publication is a public official or public figure. What is more, *the defamed public official or public figure must prove* not only that *the publication is false* but it was knowingly so or was circulated with reckless disregard for its truth or falsity") (emphasis added).

For purposes of this brief, we treat the issue presented here as one of first impression in this Court.

is clearly outweighed by the social interest in order and morality.'" *Gertz, supra,* 418 U.S. at 340.

Because that is so, the issue in this Court's prior cases has been whether to "extend a measure of *strategic* protection to defamatory falsehood," in order to "assure to freedom of speech and press that 'breathing space' essential to their fruitful exercise." *Id.* at 342 (emphasis added). The Court has reasoned that "[a]lthough the erroneous statement of fact is not worthy of constitutional protection, it is nonetheless inevitable in free debate" and that "[t]he First Amendment requires that we protect some falsehood in order to protect speech that matters." *Id.* at 340-41. *See also St. Amant v. Thompson, supra,* 390 U.S. at 732.[2]

To determine how much "strategic protection" to afford false speech in order to "protect speech that matters," the Court "has sought to define the accommodation required to assure the vigorous debate on public issues that the First Amendment was designed to protect while at the same time affording protection to the reputations of individuals." *Hutchinson v. Proxmire,* 443 U.S. 111, 133-34 (1979). Through that process of accommodation the Court has formulated separate rules of constitutional privilige for: defamation concerning a public official, *New York Times Co. v. Sullivan, supra,* or public figure,

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[2] *Compare Curtis Publishing Co. v. Butts,* 388 U.S. 130, 152 (1967) (opinion of Harlan, J.):

> [S]ome antithesis between freedom of speech and press and libel actions persists, for libel remains premised on the content of speech and limits the freedom of the publisher to express certain sentiments, at least without guaranteeing legal proof of their substantial accuracy.
>
> While the truth of the underlying facts might be said to mark the line between publications which are of significant social value and those which might be suppressed without serious social harm, and thus resolve the antithesis on a neutral ground, we have rejected . . . the argument that a finding of falsity alone should strip protections from the publisher.



*Curtis Publishing Co. v. Butts, supra*; defamation concerning a private figure involved in a matter of public concern, *Gertz, supra*; and defamation concerning a private figure and a matter not of public concern, *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.,* —— U.S. ——, 53 L.W. 4866 (June 26, 1985).

This case in contrast to all the prior *New York Times* cases does *not* involve the question of whether to extend "strategic protection" to admittedly (or assumedly) false speech. Rather, at issue here is one aspect of the procedures for determining whether defamatory speech is true or false—*viz.*, the allocation of the burden of persuasion on the question of truth or falsity. And the issue here can be further refined to the context of defamatory speech on a matter of public concern because that is the factual context in which this case arises: the newspaper articles in question concern (alleged) ties between a liquor store chain and organized crime and the (alleged) use of political connections to enable this chain to continue to do business in violation of state law. The subject matter of these articles thus falls easily within the Court's test for determining "public concern": "'Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.'" *First National Bank of Boston v. Billotti,* 435 U.S. 765, 776 (1978), *quoting Thornhill v. Alabama,* 310 U.S. 88, 102 (1940).

The resolution of the question here does not, in our judgment, turn on the prophylactic considerations that have been determinative in past cases. Rather, as we proceed to show, this case can and should be decided on the basis of more elementary principles of First Amendment jurisprudence.[3]

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[3] This is not to deny that a holding requiring defendants to assume the burden of proving truth in order to avoid liability for defamatory statements would have a chilling effect on the dissemination of truthful information. Thus, this case could be decided by

**B.** We start from the proposition that "[t]o experienced lawyers it is commonplace that the outcome of a lawsuit—and hence the vindication of legal rights—depends . . . often on how the factfinder appraises the facts." *Speiser v. Randall*, 357 U.S. 513, 520 (1958). "Thus the procedures by which the facts of the case are determined assume an importance fully as great as the validity of the substantive rule of law to be applied." *Id.* And in particular, "[w]here the burden of proof lies on a given issue is, of course, rarely without consequence and frequently may be dispositive to the outcome of the litigation." *Lavine v. Milne*, 424 U.S. 577, 585 (1976).

In the context of a defamation action, if the burden of persuasion on the issue of truth or falsity were placed on the defendant, a plaintiff would be entitled to recover damages from a speaker based on evidence that a particular statement is injurious to the plaintiff's reputation but absent any evidence that the statement is false.[4] Such an allocation of the burden of persuasion would likewise permit recovery where the evidence is in equipoise as to whether the statement is true or false. And such an allocation of the burden of persuasion would increase the

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applying the mode of analysis used in *e.g. Gertz* and *Dun & Bradstreet, viz.*, balancing that chilling effect against the injury to reputation that could result from placing the burden of persuasion on the plaintiff. We believe that the threat to free expression that would result from requiring defendants to prove truth to avoid liability far outweighs the threat to the reputation that would result from requiring plaintiffs to prove falsity in order to establish liability. But as we show in text, it is not necessary to engage in this balancing process to conclude that the First Amendment requires that the burden of persuasion with respect to truth or falsity be allocated to the plaintiff.

[4] Of course, if the plaintiff were a public official or public figure, or if the speech involved a matter of public concern, the plaintiff also would be required to prove culpability on the defendant's part. *See* pp. 11-12 *infra*. But as the court below correctly observed, the issues of culpability and truth or falsity are "not synonymous": "[a] plaintiff can demonstrate negligence [or recklessness] in the manner in which the material was gathered, regardless of its truth or falsity." App. A-18, A-19 n.13.



risk that damages would be awarded for speech that, in fact, is truthful.[5] As we proceed to show, the First Amendment does not allow these results.

The First Amendment embodies our "profound national commitment to the principle that debate on public issues should be uninhibited robust and wide-open." *New York Times, supra*, 376 U.S. at 270. "The . . . Amendment, said Judge Learned Hand, 'presupposes that right conclusions are more likely to be gathered out of a multitude of tongues than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all.' " *Id.*

Given this commitment, the Court has concluded that the interest in truthful expression on matters of public concern outweighs the countervailing interests of those whose reputation may be injured by such expression. "The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment." *Thornhill v. Alabama, supra*, 310 U.S. at 101. And this is so regardless of the speaker's motives in making the truthful publication. That is the central teaching of *Garrison v. Louisiana*, 379 U.S. 64, 73 (1964):

> If upon a lawful occasion for making a publication, [the publisher] has published the truth, and no more, there is no sound principle which can make him liable, even if he was actuated by express malice. . . .
>
> It has been said that it is lawful to publish truth from good motives, and for justifiable ends. *But this rule is too narrow.* If there is a lawful occasion—a legal right to make a publication—and the matter

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[5] Although under the preponderance of the evidence standard applicable in most civil litigation the "litigants . . . share the risk of error in roughly equal fashion," *Addington v. Texas*, 441 U.S. 418, 423 (1979), that standard tilts the risk of error in the direction of the party upon whom the burden is placed, as that party will lose in every case in which the factfinder is in doubt.

> true, the end is justifiable, and that, in such case, must be sufficient. [Emphasis added]

Indeed, it is difficult to imagine what speech the First Amendment would protect if not truthful speech about matters of public concern.[6]

Because true statements on public issues are constitutionally protected, their publication may not form the basis for an award of damages; this is part of what it means to say that the speech is protected. As the Court stated in *Garrity v. New Jersey*, 385 U.S. 493, 500 (1967), "There are rights of constitutional stature whose exercise a State may not condition by the exaction of a price . . . Assertion of a First Amendment right is [one such right]." Indeed, that is the central lesson of *New York Times* as well: "civil libel is a form of regulation," thus "what a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel." 376 U.S. at 277.

It follows that, in a defamation action, before a defendant/speaker may be required to pay damages on account of his speech, it must be established that the defendant's speech is false and therefore unprotected. And this in turn requires that the plaintiff bear the burden of persuasion on the issue of truth or falsity. Any other rule would permit the State to "exact a price" and thereby sanction speech, through civil damages, ab-

[6] A similar line has been drawn in the decisions involving commercial speech. The Court has concluded that while truthful advertising is protected, *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976), false commercial speech is not because such speech does not advance the "First Amendment concern for commercial speech [which] is based on the information function of advertising," *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 562 (1980). The Court has distinguished false commercial speech from false speech on matters of public concern, however, on the ground that the former "is not 'particularly susceptible to being crushed by overbroad regulation,' " *id.* at 562 n.6, and therefore the Court has decided that the Constitution does not require that any "strategic protection" be extended to false commercial speech.



sent proof that—or where the evidence is in equipoise as to whether—the speech stands outside the protective umbrella of the First Amendment.

C. In the context of the rules of culpability formulated in *New York Times* and its progeny the Court has recognized as much. As previously noted, to provide "breathing space" for truthful expression, the Court has extended "strategic protection" to false, defamatory speech if the speech is uttered without fault; the degree of culpability required to cause a defamatory falsehood to lose its "strategic protection" varies with the nature of the falsehood and the subject matter of the speech. Pp. 6-7 *supra*. But whatever the degree of culpability that is required before particular false speech is deemed to be unprotected, the Court has made clear that the burden of proving such culpability rests on the plaintiff.

The roots of this rule can be traced to *New York Times* itself where the Court concluded that " 'the showing of malice required for the forfeiture of the [constitutional] privilege is not presumed *but is a matter of proof by the plaintiff* . . .' " 376 U.S. at 284 (emphasis added). On that basis the Court reversed the judgment for the plaintiffs in that case because "the proof presented to show actual malice lacks the convincing clarity which the constitution demands." *Id.* at 285. In subsequent cases involving public officials and public figures the Court has reiterated and applied this holding to reverse judgments where the plaintiffs had failed to prove malice.[7] In *Herbert v. Lando*, *supra*, the Court, recognizing that "*New York Times* and its progeny ma[ke] it essential to

[7] *See, e.g., Time Inc. v. Hill*, 385 U.S. 374, 387-88 (1967); *Beckley Newspapers v. Hanks*, 389 U.S. 81, 83 (1967); *St. Amant v. Thompson*, *supra*, 390 U.S. at 730; *Greenbelt Pub. Assn. v. Bresler*, *supra*, 398 U.S. at 8. We do not here address the question whether falsity, like culpability, must be proven with "convincing clarity," *viz.*, by "clear and convincing evidence," as that question is not presented by this case: the jury here ruled for the defendants pursuant to an instruction requiring that the plaintiffs prove falsity only by a preponderance of the evidence.

proving liability that the plaintiff focus on the conduct and state of mind of the defendant," 441 U.S. at 160, upheld the right of plaintiffs to take discovery from defendants on these issues lest "liability is to be completely foreclosed," *id.* And in *Bose Corp. v. Consumers Union*, —— U.S. ——, 52 L.W. 4513, 4520 (April 30, 1984), the Court added to the requirement that plaintiffs prove culpability the further requirement that the appellate courts conduct an independent review of the sufficiency of the plaintiff's evidence of fault.

It follows *a fortiori* from the decisions just reviewed that the burden of proving falsity must be placed upon the plaintiff. If a plaintiff is required to prove that a defamatory *falsehood*—which "in and of itself carries no First Amendment credentials," *Herbert v. Lando, supra*, 441 U.S. at 171—does not qualify for the "strategic protection" afforded by *New Yo k Times* and its progeny, necessarily the plaintiff must also be required to prove that a defamatory statement is false and therefore does not qualify for the protection to which truthful speech is entitled in its own right because of its transcendent value in furthering "uninhibited, robust and wide-open debate on public issues." *New York Times, supra*, 376 U.S. at 270.

In other words, before damages may be awarded in a defamation action, the evidence must suffice "to strip the utterances of the First Amendment protection," *Bose Corp., supra*, 52 L.W. at 4520, which at the least means that the evidence must suffice to establish falsity. Proof of falsity thus is required "to cross the constitutional threshold that bars the entry of any judgment" against truthful speech. *Id.*

**D.** The Pennsylvania Supreme Court viewed the problem here in precisely the opposite way. That court reasoned that because a plaintiff must prove malice or negligence, the plaintiff should not also be required to prove falsity:



> The "breathing space" requirement of the First Amendment has not been extended, nor do we believe it can be reasonably extended, to condone or to encourage irresponsible conduct by the media in its exercise of informing the public of newsworthy events. Nor can we conceive of a legitimate constitutionally protected interest in condoning the media's malicious or negligent discharge of this responsibility. [Pet. App. at A-21]

But as we have seen, there is a "legitimate constitutional interest"—indeed, given the values and purposes of the First Amendment, an overriding interest—in the dissemination of truthful information. And that interest exists even where the disseminator did not use due care (or acted recklessly) in ascertaining whether the statement he planned to disseminate is true. Thus, while there is no reason to "condone or to encourage irresponsible conduct by the media," it would be contrary to the First Amendment to punish the publication of truthful information simply because the media did not act responsibly in gathering the information. For First Amendment purposes the requirement of "responsible media conduct" is a means toward the end of truthful media speech, not an end in itself. The court below thus confused means and ends in holding that "irresponsible conduct" in itself causes truthful speech to lose its constitutional protection.

The Pennsylvania Supreme Court also voiced a practical concern about placing the burden of persuasion with respect to the issue of truth or falsity on the plaintiff: "where the [defamatory] accusation is totally general and without the specificity necessary for a response" the plaintiff would be severely handicapped, in that court's view, if he/she had to prove the accusation to be false. Pet. App. A-5. The Pennsylvania Court recognized that this "evidentiary consideration[] . . . cannot support the presumption of falsity if it is offensive to constitutional mandate," *id.* A-8, and hence cannot be dispositive here.

But even on its own terms, that court's argument cannot withstand analysis.

In many if not most cases, the statements which form the basis for a defamation lawsuit will be specific enough that the Pennsylvania Supreme Court's concern simply will not apply; in such cases the plaintiff will be at least as well situated to prove falsity as the defendant will be to prove truth. Moreover, even where a defamatory statement is "totally general," the existence of the discovery process provided for in Pennsylvania civil procedure[8] ordinarily will enable the plaintiff, by the time of the trial, to obtain "the specificity necessary for a response." And even in the rare case in which such specificity is still lacking at the time of trial, the problem the court below hypothesized could be resolved by placing the initial burden of *production* on the defendant to articulate the factual basis for the defamatory accusation, thereby enabling the plaintiff to respond. *Cf. Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981). In no event does the concern the Pennsylvania Supreme Court raised warrant placing the risk of nonpersuasion with respect to truth or falsity on the defendant and thereby permitting libel judgments to be entered where the evidence is in equipose as to whether the statement is true and therefore entitled to constitutional protection.

**E.** This conclusion is confirmed by decisions of this Court involving analogous First Amendment questions. For example, in cases involving the regulation of obscenity, the Court has reviewed not only the substantive standards applied by the States but also has concluded that the Constitution "requires that regulation by the States of obscenity conform to procedures that will ensure against the curtailment of constitutionally protected expression. . ." *Bantam Books Inc. v. Sullivan*, 372 U.S. 58, 66 (1963). In particular, in *Freedman v. Maryland*,

[8] *See* Pennsylvania Rules of Civ. Procedure, 4001-4020.



380 U.S. 51, 58 (1965), the Court concluded that "the burden of proving that the [speech] is unprotected expression must rest on the censor." The Court reaffirmed that holding in *Blount v. Rizzi*, 400 U.S. 410, 417 (1971) and again in *Southeastern Promotions Ltd. v. Conrad*, 420 U.S. 546, 560 (1975).

Perhaps most closely on point is this Court's decision in *Speiser v. Randall, supra*, on which the obscenity cases relied. In *Speiser*, California had denied a tax exemption to certain individuals because they had failed to prove that they had not engaged in certain specified speech. This Court concluded that California had violated the First Amendment is so doing. The Court "assume[d] without deciding that California may deny tax exemptions to persons who engage in the proscribed speech." 357 U.S. at 520. But the Court concluded that California could not impose the burden of persuasion on the individuals to prove that they had not done so:

> As cases decided in this Court have abundantly demonstrated, the line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed, or punished is finely drawn. The separation of legitimate from illegitimate speech calls for more sensitive tools than California has supplied. *In all kinds of litigation it is plain that where the burden of proof lies may be decisive of the outcome. There is always in litigation a margin of error, representing error in factfinding,* which both parties take into account. Where one party has at stake an interest of transcending value—as a criminal defendant his liberty—this margin of error is reduced as to him by the process of placing on the other party the burden . . . of persuading the factfinder at the conclusion of the trial of his guilt beyond a reasonable doubt. Due process commands that no man shall lose his liberty unless the Government has borne the burden of producing the evidence and convincing the factfinder of his guilt. *Where the transcendent value of speech is involved, due process*

> *certainly requires in the circumstances of this case that the State bear the burden of persuasion . . .* [357 U.S. at 526-27; emphasis added; citations omitted.]

Here, too, because "the transcendent value of speech is involved," the Constitution requires that he who would exact damages for such speech must bear the burden of persuasion on the issue of falsity which is the first hallmark of whether the speech is protected by the First Amendment or unprotected.

## CONCLUSION

For the foregoing reasons, the judgment of the Pennsylvania Supreme Court should be reversed.

Respectfully submitted,

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